No. 86-608

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In The
Supreme Court of the United States
October Term, 1986

CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY, ILLINOIS MANUFACTURERS' ASSOCIATION AND MID-AMERICA LEGAL FOUNDATION,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Section 307(b) of the Clean Water Act authorizes the owner or operator of a publicly owned treatment works ("POTW") to revise the pretreatment requirements for a source discharging any toxic pollutant "to reflect the removal of such toxic pollutant by such works."

In 1984, the Administrator of the Environmental Protection Agency ("EPA"), after extensive rulemaking and consideration of commentary from the public, revised the general pretreatment regulations governing such "removal credit" authority (a) to utilize the average (instead of the average of the lowest 50%) of samples representative of a POTW's annual operations, including seasonal variations, "to provide a more accurate and equitable estimate of the actual removal generally achieved" by a POTW, (b) to eliminate an annual time-based adjustment for combined sewer overflow ("CSO") conditions, and (c) generally to require withdrawal of removal credit authority from a POTW "consistently and substantially" failing to achieve the removal rate on which the credit was based.

In the decision below, the United States Court of Appeals for the Third Circuit struck down the revisions for lack of daily and monthly limits on the discharge from a POTW in the general regulations. The court further ruled that EPA had not established comprehensive guidelines for sludge use or disposal under Section 405 of the Act sufficient to permit any removal credit under Section 307 (b). The questions presented are:

1. Whether the decision of the court of appeals improperly upset EPA's construction of the Act, thereby disrupting a key aspect of the control of water pollution.

2. Whether the challenge of EPA's decisions not to include daily and monthly limits on the discharge from a POTW in general regulations and not to complete more comprehensive sludge guidelines before allowing the exercise of removal

credit authority, constituted alleged failures to perform non-discretionary duties within the jurisdiction of the district courts, not the courts of appeals, under Section 505 of the Act.

PARTIES

The list of parties set out in the prior petition for a writ of certiorari to review the same judgment, filed by Chemical Manufacturers Association ("CMA") in Docket No. 86-239, is hereby incorporated by reference.

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Petitioners, Chicago Association of Commerce and Industry, Illinois Manufacturers' Association and Mid-America Legal Foundation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in *National Resources Defense Council, Inc. v. EPA et al.*, No. 84-3530 (3d Cir. 1986).[1]

[1] The prior petition to review the same judgment filed by CMA

(Footnote continued on the following page)

OPINION BELOW

The opinion of the court of appeals is reported at ___F.2d___, and a copy of the slip opinion is reprinted in the appendix to the petition in No. 86-239 (*"CMA App.*) at A-1 which is incorporated by reference.

JURISDICTION

The judgment of the court of appeals is dated April 30, 1986. Timely petitions for rehearing were denied on July 11, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 307(b)(1) and 405(d) of the Clean Water Act, 33 U.S.C. §§1317(b)(1) and 1345(d) (1982), which are set out as Exhibits A and B, respectively, in the appendix to the opinion below. CMA App. at A-55 and A-56. The 1984 removal credit rule is codified at 40 C.F.R. §403.7 (1985) and is set out as Exhibit C in the appendix to the opinion below. CMA App. at A-57.

STATEMENT OF THE CASE

Petitioners intervened in the proceedings below to present the interest of commercial and industrial enterprises whose process wastewater is entitled to the tertiary treatment provided at the treatment plants of the Metropolitan Sanitary District of Greater Chicago (the *"Chicago POTW"*) in reasonable and workable removal credits. Similarly situated enterprises throughout the nation are also confronted with the

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1 *(Continued)*

in Docket No. 86-239 focuses on the requirement for comprehensive sludge regulations. Because we believe that review should be granted in No. 86-239, the matters related to sludge regulations set out in that petition will be incorporated by reference and not repeated herein.

unworkability of prior removal credit rules for large and well-run POTWs.

The Chicago POTW is a tax supported unit of local government and the trustees of the district are elected by the general public. Historically, Chicago has done much to protect the waters within its jurisdiction. It has reversed the flows of the Chicago and Calumet Rivers to protect the waters of Lake Michigan. The Chicago POTW prohibits the discharge of sewage or industrial process waters into the Lake Michigan basin and operates seven modern treatment plants sized and designed to treat the industrial wastewater of all facilities within its jurisdiction before discharge into waters of the United States flowing towards the Mississippi. As a result, fishable, swimmable and drinkable water has long been a reality, not a goal, in Chicago.

In 1969, The Chicago POTW adopted a Sewage and Waste Control Ordinance which required industrial users to pretreat their process wastewater so that the combined pretreatment by those facilities and the treatment provided by the Chicago POTW itself would meet the standards established by its national pollutant discharge elimination system ("NPDES") permit for discharge to waters of the United States. The Chicago POTW has achieved a 99.6% compliance rate with the effluent limitations of its NPDES permit. Its occasional .4% excedences are almost entirely attributable to minor operational difficulties or unusual natural events interfering with its treatment of domestic, not industrial, waste.

The Chicago POTW found the earlier versions of the removal credit rule so unworkable that it never applied for removal credit authority thereunder even though it already had achieved compliance with applicable effluent limitations utilizing only its own long standing pretreatment ordinance. Petitioners concerns were addressed less to the substantive standards than to the measurement and reporting requirements utilized in earlier versions of the rule, CMA App. at A-24 m.12.

These petitioners challenged the prior regulations on the grounds that they were unworkable and unsurped the authority granted to POTWs by Section 307(b) to revise the pretreatment standards subject to the statutory conditions. Although the court of appeals sustained EPA's authority to condition approval of pretreatment programs under Section 402(b)(8) upon satisfactory removal credit provisions, EPA began a review of those regulations in the course of that litigation. *National Association of Metal Finishers v. EPA*, 719 F.2d 624 (3d Cir.1983), *rev'd in part sub nom, Chemical Manufacturers' Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The 1984 removal credit rule involved in this case is the direct result of EPA's review of the 1981 rule. The 1984 rule establishes revised criteria upon which EPA will condition the approval of a pretreatment program authorizing POTWs to grant removal credits. The removal credits provision modifies the earlier version of the rule in order to accomplish more effectively the dual purpose of Section 307(b) to avoid redundant treatment and yet to ensure that the combination of treatment by the POTW and indirect dischargers will produce a discharge that does not violate the effluent standard that would apply to a toxic pollutant discharged directly.

The new removal credit rule (a) revises the methods used to measure removal and to calculate the consistent removal rate of a POTW on the basis of the average (instead of the average of the lowest 50%) of samples representative of the POTW's annual operations, including seasonal variations, "to provide a more accurate and equitable estimate of the removal generally achieved," (b) eliminates an annual time-based adjustment for CSO conditions, and (c) generally restricts the remedy of a withdrawl of removal credit authority to a POTW "consistently and substantially" failing to achieve the removal rate on which the credit was based. 49 Fed. Reg. 31212 (1984).

Despite the absence of daily or monthly limits on the dis-

charge from a POTW in any prior version of the removal credit rule and notwithstanding the normal application of appropriate daily and monthly limits to each POTW in its NPDES permit, the court of appeals rejected EPA's 1984 revisions for lack of such limits in the general removal credit rule. CMA App. at A-19 to A-34.

> "The reason for requiring polluters to meet daily and monthly limits as well as long term limits is obvious: a single concentrated discharge of a toxic pollutant can do irreparable damage to the ecology of a body of water, killing fish and other life forms."

CMA App. at A-32. Although the court did not address either the lack of daily and monthly limits in any prior version of the rule or the capability of appropriate daily and monthly limits in the NPDES permit of each POTW to prevent such harm, the same concern was reflected in the court's rejection of EPA's elimination of any CSO adjustment and EPA's general restriction of the remedy of a withdrawl of removal credit authority. CMA App. at A-34 to A-46.

Petitioners incorporate by reference the statement of the case generally and with respect to sludge requirements as set out in the CMA petition. The background of the case and the court's sludge requirements are also set out in the opinion below. CMA App. at A-1 to A-15 and A-46 to A-52.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition for a writ of certiorari for three reasons that the Court has traditionally found compelling.

I. The Decision Below Presents Important Questions Of Law That Should Be Settled By This Court.

The court of appeals has decided important questions of federal law with substantial nationwide impact which have not been, but should be, settled by this Court. Moreover, in the circumstances of this case, any possibility of conflict among circuits on the substantive issues of federal clean water law raised

by EPA's 1984 removal credit rule is remote. Accordingly, this Court probably can settle such important questions only on this occasion.

Petitioners incorporate by reference the petition in No.86-239 as to the national impact of the decision below and, in particular, the requirement for more comprehensive sludge regulations, CMA petition at 9-12. The court of appeals requirement for daily and monthly limits or for some compromise effort to provide a substitute for such limits in the general rule will permanently deprive any large and well-run POTW of any credit for a substantial portion of the removal actually achieved by such POTW. The immediate result clearly will be wasteful and redundant treatment. More importantly, the long term effect of such a denial will be to discourage other POTWs from taking the lead in clean water efforts without advance assurance of proper credit for such action.

II. The Decision Below Conflicts With Decisions Of This Court And Numerous Courts Of Appeals In Ruling On The Adequacy Of Regulations Not Reviewable In The Courts Of Appeals.

The decision below conflicts with the decisions of this Court and other circuit courts of appeals in ruling on the decision of EPA not to promulgate daily and monthly limits on discharge from a POTW in the general removal credit rule and on the decision of EPA not to withhold approval of the exercise of removal credit authority under Section 307 (b) of the Act until more comprehensive sludge guidelines have been promulgated under Section 405 of the Act. Even if such decisions could be alleged to involve duties which are not discretionary on the part of EPA, jurisdiction to review the same would lie in a district court under Section 505 of the Act and not in a court of appeals under Section 509 of the Act.

In a district court evidence as to the reasons involved in EPA's decision not to act in some manner which is allegedly not discretionary could be received. Here, the court

of appeals accepted EPA's explanation that the 1984 rule was more accurate and equitable in calculating the amount of actual removal by a POTW for which credit could be given. It rejected that explanation as to the absence of daily and monthly limits which is a matter to which EPA had not addressed it. None of the prior versions of the rule contained daily and monthly limits so that the lack of an EPA explanation for the absence of such limits in its formal commentary on the revisions is hardly surprising. As indicated below, the normal application of daily and monthly limits in the NPDES permit of each POTW readily comes to mind. Neither that possibility nor its adequacy was even considered in the decision below. In a district court such matters could be fully examined and pertinent evidence received.

Petitioners incorporate by reference the petition in No. 86-239 as to the conflict of the decision below with decisions of this Court and other courts of appeals in ruling on the absence of more comprehensive sludge regulations. CMA petition at 13-17. That conflict is also presented by the ruling on daily and monthly limits in the court below.

III. Contrary To Recent Decisions Of This Court, The Decision Below Upsets EPA's Reasonable Construction Of The Act.

Contrary to the recent decisions of this Court in *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116 (1985) and *Chevron v. NRDC*, 467 U.S. 837 (1984), the decision below upsets EPA's reasonable construction of the Act. By holding that daily and monthly limits on the discharge from a POTW must be included in the general removal credit rule, the court of appeals has effectively prohibited any credit for a substantial portion of the actual removal of toxic pollutants by large and well-run POTWs. The most cursory review of EPA's explanation for the 1984 rule clearly indicates that the revisions were focused on problems created by the difficulty of measurement at the lowest levels of concentration, not the highest. Proper calculation factors for samples with concentra-

tions below the level of measurability had presented a particular problem. The court of appeals, however, focused on the possibility of "a single concentrated discharge of a toxic pollutant" without daily and monthly limits in the general rule. CMA App. at A-32.

Prior versions of the removal credit rule, in an unanalytical effort to require a consistency of removal that could be achieved virtually all of the time, had limited credit to the removal actually achieved in 95% and, later, 75% of the samples representative of a POTW's annual operations. CMA App. at A-21 to A-25. The difficulties with that approach were numerous. It did nothing to limit "a single concentrated discharge." Concentrated discharges between a source and the POTW treatment plant are confined to the POTW sewer system. Discharge from the POTW can be, and traditionally has been, regulated directly with daily and monthly limits in the NPDES permit for each POTW. The earlier efforts at some form of short term limit in the general rule did, however, result in credit significantly and unnecessarily below "the removal" actually achieved by a POTW as authorized by Section 307(b) of the Act. Such provisions clearly failed to avoid wasteful and redundant treatment by both indirect dischargers and POTWs.

EPA's construction of the Act in the 1984 removal credit rule is clearly reasonable. It avoids the difficulties admittedly involved in prior versions of the rule and simply does not lead to the difficulties asserted by the court of appeals because daily and monthly limits can be, and normally are, included in the NPDES permit for each POTW. Petitioners incorporate by reference the petition in No. 86-239 as to EPA's reasonable construction of the Act with respect to the sludge requirements of Section 307(b). CMA petition at 17-22.

Finally, it should be noted that EPA's general restriction of the remedy of a withdrawal of removal credit authority to a POTW "consistently and substantially" failing to achieve the removal rate on which the credit is based does not allow for lengthy violations of the Act. Any limit in a NPDES permit

may be properly and promptly enforced. Unusual or sporadic operational difficulties at a POTW should hardly require expensive and redundant pretreatment facilities at each source utilizing the system as an ordinary remedy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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